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Everything, but Maybe Nothing: The Supreme Court's Important—but Fragile—Decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*: 137 S. Ct. 2012 (2017)

John Lucas Rockenbach
University of Nebraska College of Law

Note*

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* John Lucas Rockenbach, J.D. candidate, 2019, University of Nebraska College of Law.

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I. INTRODUCTION

Trinity Lutheran Church operates a daycare in Columbia, Missouri.[1] The daycare includes a playground used by children in the daycare and other children in the community.[2] Coarse pea gravel covers most of the playground.[3] When children fall on the playground, the "unforgiving" gravel scrapes their knees.[4]

To make the playground safe for all children and accessible for children with disabilities, Trinity Lutheran applied for a grant with the Missouri Department of Natural Resources (the Department) in 2012.[5] The Department runs a resurfacing grant program, which enables schools and daycares to obtain softer, safer surfaces for playgrounds by reimbursing purchases of recycled-tire surfacing.[6] The grant program is competitive because the state does not have unlimited resources.[7] The Department ranks applicants and distributes funds to those ranking highest.[8]

In 2012, forty-four playgrounds applied, and the Department issued fourteen grants.[9] Fortunately for Trinity Lutheran, it scored among the highest applicants, ranking fifth.[10] Unfortunately for Trinity Lutheran and the children in its neighborhood, the Department still denied its application.[11]

The Department denied Trinity Lutheran because it is a church.[12] The Department cited Article I, Section 7 of Missouri's constitution, which forbids the state from funding religious organizations.[13] Trinity Lutheran sued, claiming the state violated the Free Exercise Clause of the First Amendment by categorically excluding churches from a pub-

1. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).
2. *Id.* at 2017–18.
3. *Id.* at 2017.
4. *Id.* at 2017, 2025.
5. *Id.* at 2017–18.
6. *Id.* at 2017.
7. *Id.*
8. *Id.* The Department ranks an applicant using criteria including the poverty of its neighborhood and its plan to promote recycling. *Id.*
9. *Id.* at 2018.
10. *Id.*
11. *Id.*
12. Brief for Petitioner at 1, *Trinity Lutheran*, 137 S. Ct. 2012 (No. 15-577).
13. Brief of Respondent at 1, *Trinity Lutheran*, 137 S. Ct. 2012 (No. 15-577). The text of that section reads:

> [N]o money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect, or creed of religion, or any form of religious faith or worship.

MO. CONST. art. I, § 7.

lic benefit program.[14] A district court granted summary judgment for the Department.[15]

This Note focuses on Trinity Lutheran's case. Part II traces the case's appellate history. Part II also summarizes how the Court has treated the religion clauses of the U.S. Constitution and how those clauses interact with each other. Part III argues the Supreme Court correctly held that Missouri's policy violated the Free Exercise Clause but contends that one aspect of the Court's reasoning—how it distinguishes between religious *status* and religious *use*—is unsound and should be abandoned. Part III also identifies two areas of current litigation affected by *Trinity Lutheran Church v. Comer*. Part IV describes how lower courts have reacted to *Trinity Lutheran*, questions the immediate impact of the case, and forecasts future Supreme Court action.

II. BACKGROUND

A. The Religion Clauses

The Establishment Clause and the Free Exercise Clause (the religion clauses) of the Constitution read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[16] The religion clauses complement one another in their goal of protecting "freedom of religious belief and actions"[17] but achieve this goal in different ways. The Establishment Clause restrains government from specially "support[ing]" religion,[18] while the Free Exercise Clause restrains government from "impos[ing] special disabilities" on religion.[19]

Because government efforts to avoid improperly supporting religion may be construed as imposing special disabilities on religion and government efforts to avoid improperly disabling religion may be construed as supporting religion, the Court has observed that the religion clauses "tend to clash" with each other when "expanded to a logical extreme."[20] Given this tendency to clash, the Court has refused to ex-

14. *Trinity Lutheran*, 137 S. Ct. at 2018.
15. Trinity Lutheran Church of Columbia, Inc. v. Pauley, 976 F. Supp. 2d 1137, 1140 (W.D. Mo. 2013), *aff'd*, 788 F.3d 779 (8th Cir. 2015), *rev'd and remanded sub nom.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).
16. U.S. CONST. amend. I.
17. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1248 (5th ed. 2015).
18. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).
19. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).
20. *Walz*, 397 U.S. at 668–69; *see also* Mark C. Rahdert, *A Jurisprudence of Hope: Justice Blackmun and the Freedom of Religion*, 22 HAMLINE L. REV. 1, 19–20 (1998) (outlining one Justice's approach to the "competing demands of the two

pand the clauses to their extremes. Instead, it has recognized that there is "room for play in the joints [between the religion clauses] productive of a benevolent neutrality" so long as the government action is not "expressly proscribed" by either of the religion clauses.[21]

So, under the "play in the joints doctrine," governments may mildly favor religion to avoid strongly disfavoring it and may mildly disfavor religion to avoid strongly favoring it. For instance, a public school may release religious students from class to receive religious instruction without marking them truant, even though that release would be incompatible with an Establishment Clause pressed to the "extremes," because doing so serves Free Exercise interests by accommodating religion.[22] In the other direction, a state may prohibit students from using scholarship funds to train for the ministry—even though that prohibition would be incompatible with a Free Exercise Clause pressed to the extremes—because doing so serves Establishment interests by preventing the government from sponsoring clergy.[23] *Trinity Lutheran* involves a state's effort to protect an Establishment Clause interest—avoiding state funding of churches[24]—and that effort's effect on a Free Exercise Clause interest—fully including religious persons in public benefit programs.[25]

On the Establishment interest in *Trinity Lutheran*, the Court has often evaluated the constitutionality of government funding of institutions owned by churches. In doing so, it has assessed funding differently based on context. Cases involving funding of parochial schools are "numerous" and "difficult to reconcile."[26] Meanwhile, cases involving funding of other religiously affiliated institutions are few and marked by deference.[27]

In *Bradfield v. Roberts*, the Court upheld a federal program that paid church-controlled hospitals to care for the poor.[28] The Court found church ownership "wholly immaterial" to the hospital's eligibility for federal funds.[29] In *Bowen v. Kendrick*, the Court upheld a competitive grant that funded institutions to solve problems of adolescent sexuality, even though many of the eventual grantees were religious

clauses"). *But see* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 11–12 (1998) (attributing the "imagined 'tension'" between the two clauses to the "rights-based" approach to the Establishment Clause).

21. *Walz*, 397 U.S. at 669.
22. Zorach v. Clauson, 343 U.S. 306, 312–15 (1952).
23. Locke v. Davey, 540 U.S. 712, 718–23 (2004).
24. Brief of Respondent, *supra* note 13, at 3.
25. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021–22 (2017).
26. CHEMERINSKY, *supra* note 17, at 1296.
27. *See id.* at 1313–15.
28. 175 U.S. 291 (1899).
29. CHEMERINSKY, *supra* note 17, at 1313 (quoting *Bradfield*, 175 U.S. at 298).

organizations.[30] The *Bowen* Court applied the *Lemon* test.[31] It decided that the grant had a secular purpose—solving problems of adolescent sexuality—and that the government did not vitiate this secular purpose by including churches.[32] The Court also found that the program did not impermissibly advance religion because the government funded religious and nonreligious charitable organizations on a neutral basis without reference to religion.[33] In his opinion for the Court, Chief Justice Rehnquist emphasized that the Establishment Clause did not justify expunging religious organizations from public benefit programs.[34]

As for the Free Exercise interest in *Trinity Lutheran*, the Court has repeatedly held that the government cannot discriminate against religious people when distributing public benefits. The seminal case is *Sherbert v. Verner*,[35] where a Seventh-day Adventist lost her job for refusing to work on Saturday. South Carolina denied her unemployment benefits after determining she had refused work without good cause.[36] Writing for the majority, Justice Brennan explained that the "disqualification for benefits" deriving "solely from the practice of her religion" created an impermissible "burden on . . . free exercise" because it placed "unmistakable" pressure on her to forgo that practice.[37] Although *Sherbert* was construed narrowly in *Employment Division v. Smith*,[38] since *Smith* the Court has cited *Sherbert* and its progeny[39] for the proposition that governments may not discriminate in the distribution of benefits in a way that puts citizens to a choice "between their religious beliefs and receiving a government benefit."[40]

30. 487 U.S. 589, 593–97 (1988).
31. *Id.* at 602. The *Lemon* test is one approach to Establishment Clause analysis, and it involves a three-pronged inquiry. Under the *Lemon* test, a government action is invalid if it lacks a secular purpose, if its primary effect is to advance religion, or if it creates excessive entanglement with religion. *Id.* The *Lemon* test's future is uncertain because today's conservative Justices disfavor the test. CHEMERINSKY, *supra* note 17, at 1273.
32. *Bowen*, 487 U.S. at 602–04.
33. *Id.* at 605–12.
34. *Id.* at 608–10.
35. 374 U.S. 398 (1963); *see also* Theresa J. Pulley Radwan, *Sword or Shield: Use of Tithing to Establish Nondischargeability of Debt Following Enactment of the Religious Liberties and Charitable Donation Protection Act*, 19 AM. BANKR. INST. L. REV. 471, 472–74 (2011) (tracing the line of cases that started with *Sherbert*).
36. *Sherbert*, 374 U.S. at 399–402.
37. *Id.* at 403–04.
38. 494 U.S. 872, 882–85 (1990). *Smith* rejected *Sherbert*'s compelling interest test for neutral laws that indirectly burden religious activity. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760–61 (2014); *see also* Radwan, *supra* note 35, at 474–75 (explaining *Smith*'s treatment of *Sherbert*).
39. Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981).
40. Locke v. Davey, 540 U.S. 712, 720–21 (2004).

Thus, the Court has allowed governments to fund religious organizations when they have done so in a way that is neutral to religion and has prohibited governments from discriminating against religion with public benefits.

B. Appellate Opinion

The Eighth Circuit affirmed the district court's dismissal of Trinity Lutheran's suit.[41] The Eighth Circuit described Trinity Lutheran's claims as "plainly facial attacks on Article I, § 7, of the Missouri Constitution"[42] and held that the Supreme Court's summary affirmance of *Luetkemeyer v. Kaufmann*[43] precluded the court of appeals from finding Section 7 facially invalid.[44]

In *Luetkemeyer*, plaintiffs challenged Missouri's policy of busing children to public schools but not parochial schools.[45] A district court upheld Missouri's bus policy.[46] The court identified the case as falling in the play of the joints between the Establishment Clause and the Free Exercise Clause.[47] It noted that while *Everson v. Board of Education*[48] and the Establishment Clause did not forbid busing students to parochial schools, *Sherbert* and the Free Exercise Clause did not require busing either.[49] *Sherbert* involved only the right to participate in benefit programs offered to the public, not the right to demand new programs uniquely benefiting religious organizations.[50] In any case, Missouri had a compelling interest in upholding the separation of church and state demanded by its constitution, even though its Article 1, Section 7 went beyond the federal Establishment Clause.[51]

However, the Eighth Circuit noted that the Court's understanding of the Establishment Clause has "evolved rather dramatically" since *Luetkemeyer* and compared Trinity Lutheran's case to the more recent *Locke v. Davey*.[52] In *Locke*, the Supreme Court upheld Washington's

41. Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779 (8th Cir. 2015), *rev'd and remanded sub nom.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).
42. *Trinity Lutheran*, 788 F.3d at 783.
43. 364 F. Supp. 376 (W.D. Mo. 1973), *aff'd*, 419 U.S. 888 (1974).
44. *Trinity Lutheran*, 788 F.3d at 783–84.
45. *Luetkemeyer*, 364 F. Supp. at 378–79.
46. *Id.* at 387.
47. *Id.* at 386.
48. 330 U.S. 1 (1947). For a summary of *Everson* in the context of *Trinity Lutheran*, see Douglas Laycock, *Churches, Playgrounds, Government Dollars—and Schools?*, 131 HARV. L. REV. 133, 137–38 (2017).
49. *Luetkemeyer*, 364 F. Supp. at 381, 385.
50. *Id.* at 385.
51. *Id.* at 386.
52. Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779, 784–85 (8th Cir. 2015), *rev'd and remanded sub nom.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).

Promise Scholarship Program (the Program).[53] The Program provided scholarships to high-performing students in need of financial aid, but it prevented the students from using the scholarships to pursue a degree in "devotional theology."[54] Davey earned a scholarship, but Washington did not allow him to use it because he was pursuing a devotional theology degree to become a minister.[55] Thus, he argued the Program violated the Free Exercise Clause.[56]

The Court found the Program to be at the core of the play in the joints doctrine.[57] The Establishment Clause did not require Washington to exclude devotional theologians from the Program because the student—not the state—ultimately chose where and how to spend the scholarship.[58] Even though the federal Establishment Clause allowed the payments, the Court recognized the refusal to fund the training of ministers as a "historic and substantial state interest" because of Washington's establishment history and its relevant state constitutional provisions.[59] The Court found the interest strong enough to justify excluding devotional theologians against a Free Exercise claim because the Program's restrictions placed only a light burden on free exercise: recipients could still take classes in devotional theology[60] or use the scholarship to pursue a second degree,[61] and the program went "a long way toward including religion in its benefits" by allowing recipients to attend "pervasively religious schools."[62]

Returning to Trinity Lutheran's case, the Eighth Circuit observed that Missouri's establishment interest may be even greater than that vindicated in *Locke* because this case involved direct public funding of a church, while the funding in *Locke* went to a religious institution only through a chain-breaking private choice.[63] The court of appeals

53. Locke v. Davey, 540 U.S. 712, 715 (2004).
54. *Id.* at 715–17.
55. *Id.* at 717.
56. Brief for Respondent at 15, *Locke*, 540 U.S. 712 (No. 02-1315).
57. *Locke*, 540 U.S. at 722.
58. *Id.* at 719. In previous cases, the Court sustained programs where the government gave money to religious institutions when private citizens determined who would receive the money instead of the government. Zelman v. Simmons-Harris, 536 U.S. 639, 650 (2002); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 487 (1986).
59. *Locke*, 540 U.S. at 725. Article I, section 11 of Washington's constitution states, "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." Brief for Petitioners at 1, *Locke*, 540 U.S. 712 (No. 02-1315). Washington adopted this provision in 1889 (the year it became a state) to prevent government invasion into matters of religious conscience. *Id.* at 2–3.
60. *Locke*, 540 U.S. at 725.
61. *Id.* at 721 n.4.
62. *Id.* at 724.
63. Trinity Lutheran Church of Columbia, Inc. v. Pauley, 788 F.3d 779, 785 (8th Cir. 2015), *rev'd and remanded sub nom.*, Trinity Lutheran Church of Columbia, Inc.

concluded that the Court's holding in *Locke* "reinforces our decision that *Luetkemeyer* is controlling precedent foreclosing Trinity Church's facial attack on Article I, § 7, of the Missouri Constitution."[64] Having found controlling and contradicting precedent from the Supreme Court, the Eighth Circuit determined that granting relief to Trinity Lutheran was beyond its authority and insisted that relief, if it were to come at all, must come from the Supreme Court.[65] In doing so, it foreshadowed the Court's eventual approach by referring to Justice Scalia's dissent in *Locke*, which asserted that a government violates the Free Exercise Clause when it denies generally available public benefits on the basis of religion.[66]

C. Supreme Court Opinions

In a 7–2 decision, the Supreme Court reversed, holding that Missouri violated the Constitution when it excluded Trinity Lutheran's application.[67] Chief Justice Roberts wrote the Court's opinion (except as to footnote 3).[68] Justices Kennedy, Alito, and Kagan joined Roberts's opinion in full, while Justices Thomas and Gorsuch joined except as to footnote 3.[69]

1. The Majority

The Court held that the Establishment Clause did not prohibit Missouri from including Trinity Lutheran in the grant program and that the Free Exercise Clause required Missouri to include Trinity Lutheran.[70] Citing *Locke* and the agreement between the parties, the Court began by announcing that *Trinity Lutheran* was not an Establishment Clause case—Missouri could have funded Trinity Lutheran's playground surface without violating the First Amendment—but a Free Exercise Clause case.[71] Thus, the Court asked whether the "play in the joints" recognized in *Walz* and *Locke* was wide enough to permit state discretion there or the Free Exercise Clause was broad enough to proscribe that state action expressly.[72]

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v. Comer, 137 S. Ct. 2012 (2017); *see supra* note 58. In *Locke*, the student directed the state's funds when he chose to attend Northwest College. *Locke*, 540 U.S. at 717.

64. *Trinity Lutheran*, 788 F.3d at 785.
65. *Id.*
66. *Id.* (quoting *Locke*, 540 U.S. at 726–27 (Scalia, J., dissenting)).
67. *Trinity Lutheran*, 137 S. Ct. at 2016, 2019.
68. *Id.* at 2017. Footnote 3 reads: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination." *Id.* at 2024 n.3.
69. *Id.* at 2016.
70. *Id.* at 2019, 2024.
71. *Id.* at 2019.
72. *Id.* (internal quotations omitted).

The Court summarized the Free Exercise Clause as protecting "religious observers against unequal treatment" and "'special disabilities' based on their 'religious status.'"[73] The Court observed that it had accordingly applied strict scrutiny when a government denied a "generally available benefit" on the basis of religious status.[74]

The Court then reviewed its precedent in the area. The Court started this review with *Everson*, which it cited for the proposition that when a state denies the "benefits of public welfare legislation" to some people on the basis of their religious status, it interferes with their ability to exercise their religion freely and, therefore, violates the Constitution.[75] The Court moved on to *McDaniel v. Paty*—a case to which it paid particular attention. *McDaniel* concerned a Tennessee law that disqualified ministers from being delegates to the state's constitutional convention.[76] *McDaniel* held that governments cannot discriminate on religious status (there, "*status* as a minister")[77] even when the discrimination is part of a "historical tradition."[78]

The Court next showed that these principles had survived its recent cases. It cited *Lyng v. Northwest Indian Cemetery Protective Association*, which explained why a government may not deny benefits on the basis of religious status: the government thereby "penalize[s] religious activity," coercing religious adherents into violating their beliefs.[79] The Court then looked at *Smith* and emphasized that even its narrow understanding of the Free Exercise Clause did not permit "special disabilities on the basis of religious views or religious status."[80] The Court concluded its review with *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* and pointed out that *Lukumi* too forbade governments from imposing "special disabilities" on religion, which includes denying the religious public benefits.[81]

After reviewing precedent, the Court applied the precedent to the Department's policy. It said:

> The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their

73. *Id.* (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 542 (1993)).
74. *Trinity Lutheran*, 137 S. Ct. at 2019 (citing McDaniel v. Paty, 435 U.S. 618, 628 (1978) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972))).
75. *Id.* at 2019–20.
76. *Id.* at 2020.
77. *Id.* (internal quotation marks omitted) (quoting *McDaniel*, 435 U.S. at 627).
78. *Id.* at 2020.
79. *Id.* (citing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988)).
80. *Id.* at 2020–21 (internal quotations omitted) (quoting Emp't Div. v. Smith, 494 U.S. 872, 877 (1990) (citing *McDaniel*, 435 U.S. 618)).
81. *Id.* at 2021 (internal quotation marks omitted) (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (quoting *Smith*, 494 U.S. at 877)).

> religious character. If the cases just described make one thing clear, it is that such a policy imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.[82]

The Court analogized *Trinity Lutheran* to *McDaniel*.[83] Tennessee forced McDaniel to choose between continuing to be a minister and participating in a government program; Missouri forced Trinity Lutheran to choose between continuing to be a church and participating in a government program.[84] In both cases, the government unconstitutionally put a condition on the exercise of constitutional rights by excluding one who chooses to exercise those rights from a public benefit.[85]

The Court next addressed the Department's argument that *Locke* should control. The Court distinguished *Locke*. First, the Court found the scholarship program in *Locke* discriminated on religious *use* not *status*.[86] In other words, the scholarship funds were open to all applicants, regardless of their religion, but could not be used in a particular way: to train for the ministry.[87] In *Trinity Lutheran*, the Department excluded all churches, no matter how the churches planned to use the funds.[88]

The Court also emphasized that the limitation on the scholarship in *Locke* was so narrow that it did not force applicants to "'choose between their religious beliefs and receiving a government benefit.'"[89] Students could use the scholarship to attend religious schools and even take devotional theology courses, so long as they did not use it to pursue devotional theology degrees.[90] In contrast, for Trinity Lutheran to obtain the government benefit, it would have to cease to be a church.

The Court also noted the differences between Washington's anti-establishment interest in *Locke* and Missouri's anti-establishment interest in *Trinity Lutheran*. In *Locke*, the interest was to avoid state-funded training of clergy.[91] The Court considered this an especially strong establishment interest because preparing to be a minister is "akin to a religious calling" and this funding lies at the "historic core" of the First Amendment.[92] The Court could not say anything of the

82. *Id.* at 2021 (citing *Lukumi*, 508 U.S. at 546).
83. *Id.* at 2021–22.
84. *Id.*
85. *Id.* at 2022 (quoting *McDaniel*, 435 U.S. at 626).
86. *Id.* at 2023. I challenge this distinction in section III.C, *infra*.
87. *See* Locke v. Davey, 540 U.S. 712, 720–21 (2004).
88. *Trinity Lutheran*, 137 S. Ct. at 2023–24.
89. *Id.* at 2023 (quoting *Locke*, 540 U.S. at 720–21 (citing *McDaniel*, 435 U.S. 618)).
90. *Id.* at 2023–24 (citing *Locke*, 540 U.S. at 721 n.4, 725).
91. *Locke*, 540 U.S. at 721 n.5.
92. *Trinity Lutheran*, 137 S. Ct. at 2023 (quoting *Locke*, 540 U.S. at 721–22).

sort about Missouri's interest in preventing the use of public funds for playground surfaces.[93]

Finally, the Court applied strict scrutiny after finding that Missouri infringed on Free Exercise liberties. The Court found the policy could not survive strict scrutiny because the government failed to show an interest "of the highest order"[94] where it only asserted Missouri's preference for "achieving greater separation of church and State" than the federal Establishment Clause requires.[95]

2. The Concurrences

Justice Thomas concurred in part (he did not join footnote 3) and Justice Gorsuch joined his opinion.[96] Justice Thomas's short concurrence focused more on *Locke* than on *Trinity Lutheran*. Thomas wrote that *Locke*'s holding was inconsistent with the majority's prohibition against "denying a generally available benefit solely on account of religious identity."[97] He then summarized *Locke*'s holding and noted that *Locke*'s failure to subject the scholarship policy to heightened scrutiny "remains troubling."[98] He also explained that he only joined the Court's opinion because it had narrowly construed *Locke* to apply just in the "limited context of support for ministerial training" and because neither party had asked the Court to reconsider *Locke*.[99] This suggests that at least some Justices on the Court would be willing to overturn *Locke* if an appropriate case arises and, in any case, that it will be applied narrowly.

Justice Gorsuch also concurred in part (he did not join footnote 3), and Justice Thomas joined his opinion. Gorsuch's opinion "offer[ed] only two modest qualifications."[100]

First, he disagreed with the way the Court distinguished between "religious *status* and religious *use*" to explain why *Locke* did not control.[101] Gorsuch argued that the status–use distinction is unworkable and inconsistent with the First Amendment. It is unworkable, he said, because the distinction "blurs."[102] Since much of religious *identity* and *status* involves religious *activity* and *use*, it will sometimes be impossible to determine whether discrimination targets *use* or *status*. To illus-

93. *Id.* at 2023.
94. *Id.* at 2024 (internal quotations omitted) (quoting *McDaniel*, 435 U.S. at 628).
95. *Id.* (internal quotations omitted) (quoting Widmar v. Vincent, 454 U.S. 263, 276 (1981)).
96. *Id.* at 2025.
97. *Id.* (Thomas, J., concurring) (internal quotations omitted) (quoting majority opinion).
98. *Id.* (Thomas, J., concurring).
99. *Id.*
100. *Id.* (Gorsuch, J., concurring).
101. *Id.*
102. *Id.*

trate this, he asked, "Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner?"[103]

The distinction is, he observed, also inconsistent with the text and precedent of the First Amendment. He pointed out that the text of the Free Exercise Clause protects "*exercise* of religion" and so should not be interpreted to protect religious *status* only, while leaving religious *use* unguarded.[104] He also cited *Lukumi* for the proposition that the Free Exercise Clause protects religious "practices."[105]

Justice Gorsuch gave his second and related qualification: he could not join footnote 3 of the Court's opinion.[106] Gorsuch admitted that the footnote accurately described the case but expressed concern that it would be "mistakenly" read to limit the scope of the decision.[107] In particular, he feared it might be read to apply only to "children's safety or health."[108] He stated that such a limitation would be inappropriate because the Court's cases are "governed by general principles,"[109] and the "general principles here do not permit discrimination against religious exercise—whether on the playground or anywhere else."[110]

Justice Breyer wrote a separate opinion concurring in judgment only (although he "agree[d] with much of what the Court sa[id]").[111] He emphasized the "particular nature" of the benefit from which Trinity Lutheran was categorically excluded.[112] He argued Missouri's "general program designed to secure or to improve the health and safety of children" made the case analogous to *Everson*, which affirmed that the religion clauses do not prevent churches from receiving "general government services" like "police and fire protection."[113] He would have left the question of whether the religion clauses protect other benefits "for another day."[114]

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103. *Id.*

104. *Id.* at 2026.

105. *Id.* (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993)).

106. *Id.* at 2026 (Gorsuch, J., concurring). See *supra* note 68 for the full text of footnote 3.

107. *Id.*

108. *Id.*

109. *Id.* (internal quotations omitted) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 25 (2004) (Rehnquist, C.J., concurring in judgment)).

110. *Id.* (Gorsuch, J., concurring).

111. *Id.* (Breyer, J., concurring).

112. *Id.*

113. *Id.* at 2027.

114. *Id.*

3. The Dissent

Justice Sotomayor wrote a lengthy dissent, which Justice Ginsburg joined.[115] While reciting the facts, Justice Sotomayor emphasized the proselytic nature of Trinity Lutheran's daycare, which she said, "'teaches a Christian world view to children of members of the Church, as well as children of non-member residents' of the area."[116] Thus, Justice Sotomayor framed the question in the case as "whether Missouri can decline to fund improvements to the facilities the Church uses to practice and spread its religious views."[117]

In Justice Sotomayor's view, the Court's precedent demanded Establishment Clause analysis because this case involved government funding of a "house of worship."[118] In other words, while the majority decided that this was not a play in the joints case because the Free Exercise Clause requires Missouri to allow Trinity Lutheran to compete for the grant, the dissent would have held that it was not a play in the joints case because the Establishment Clause forbids Missouri from making direct payments to Trinity Lutheran. In the dissent's view, the parties' agreement on the Establishment Clause issue should not have prevented the Court from considering it because "[c]onstitutional questions are decided by this Court, not the parties' concessions."[119]

The dissent explained that if Missouri funded the playground improvements, it would violate the Establishment Clause because the state would directly fund "religious exercise."[120] The dissent found *Trinity Lutheran* to be "no different" from *Tilton v. Richardson*.[121] In that case, the Court found a federal grant unconstitutional because the grant failed to prevent recipients from using the money to build facilities that could eventually be used for religious purposes.[122] When the Court allowed direct funding of religious institutions, the dissent wrote, it did so only when the funds would not be used for religious activities, and since Trinity Lutheran used its daycare for religious purposes, the funding should be impermissible.[123]

Moving on to the Free Exercise claim, the dissent defended the play in the joints doctrine, which it found to be a necessary conse-

115. *Id.* (Sotomayor, J., dissenting).
116. *Id.* (quoting Petition for a Writ of Certiorari app at 101a, *Trinity Lutheran*, 137 S. Ct. 2012 (No. 15-577)).
117. *Id.* at 2028 (Sotomayor, J., dissenting).
118. *Id.*
119. *Id.*
120. *Id.* at 2028–29 (citing Mitchell v. Helms, 530 U.S. 793, 840 (2000) (O'Connor, J., concurring in judgment); Agostini v. Felton, 521 U.S. 203, 222–23 (1997); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)).
121. *Id.* at 2029 (Sotomayor, J., dissenting).
122. *Id.* (citing Tilton v. Richardson, 403 U.S. 672 (1971)).
123. *Id.* at 2030–31 (Sotomayor, J., dissenting).

quence of the conflicting demands of the Establishment Clause and the Free Exercise Clause.[124] The dissent reasoned that a broad space between the prohibitions of the religion clauses appropriately enables state governments to accommodate the interests of each clause.[125] This balancing sometimes allows governments to treat individuals and institutions differently based on religious status—for instance, by making churches exempt from taxation[126] or immune to certain employment discrimination laws,[127] or by refusing to fund training of the clergy.[128] Thus, the dissent accused the majority of breaking from the Court's precedent by prohibiting discrimination on the basis of religious status.

The dissent next, consistent with the Court's precedent in the area,[129] examined the history of Missouri's constitutional provision that disallows public funding of churches.[130] The dissent restated the "powerful set of arguments" that led every state to end public funding of churches.[131] First, public funding of churches "risked divisiveness" among different churches and different faiths by forcing them to compete against each other for government resources.[132] Next, sponsorship weakened religion by making it more compulsory and less voluntary.[133] Public funding was also a step toward full establishment.[134]

The dissent said, in light of the strong, historical anti-establishment interest against funding churches, *Locke* should control and permit the state to refuse to pay for Trinity Lutheran's playground surface.[135] This invocation of *Locke* is not inconsistent with the dissent's stance on the Establishment issue—that, unlike in *Locke*, the Establishment Clause forbids the grant—since in *Locke*, true private choice broke the link between taxpayer funds and funded religious activity, and this case lacks an analogous link-breaker.[136] The dissent

124. *Id.* at 2031.
125. *Id.*
126. *Id.* at 2032 (citing Walz v. Tax Comm'n, 397 U.S. 664, 673–74 (1970)).
127. *Id.* (Sotomayor, J., dissenting) (citing Corp. of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987)).
128. *Id.* (Sotomayor, J., dissenting) (citing Locke v. Davey, 540 U.S. 712, 722 (2004)).
129. *See, e.g.*, *Locke*, 540 U.S. at 722–23; McDaniel v. Paty, 435 U.S. 618, 621–26 (1978).
130. *Trinity Lutheran*, 137 S. Ct. at 2032 (Sotomayor, J., dissenting).
131. *Id.* at 2033; *see infra* section III.A.
132. *Trinity Lutheran*, 137 S. Ct. at 2033 (Sotomayor, J., dissenting).
133. *Id.* at 2033–35.
134. *Id.* at 2033–34 (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 82 (P. Kurland & R. Lerner eds., 1987) ("[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment.")).
135. *Id.* at 2035–38 (Sotomayor, J., dissenting).
136. *Id.* at 2035; *see supra* note 58 and accompanying text.

argued, however, that *Locke* was on point on the Free Exercise claim.[137] In *Locke*, the Court permitted differential treatment that might have otherwise violated the Free Exercise Clause because of the state's "serious antiestablishment . . . interests" against funding ministerial training, which were rooted in the history of the religion clauses.[138] Likewise, the dissent said the Court should permit Missouri to exclude churches from public funding programs given the serious, historically-rooted interests against directly funding houses of worship.[139] The dissent also emphasized the breadth of the decision's potential impact—thirty-eight states have provisions analogous to Missouri's constitutional amendment.[140]

Finally, the dissent criticized the majority's rule as "out of step with our precedents" and "wrong on its own terms."[141] The dissent observed that a rule which prevents differential treatment based on religious status is inconsistent with the religion clauses, which impose special requirements on government action in the area of religion.[142] It accused the majority of failing to address—and thus to reconcile—*Walz* and *Amos*, cases where the Court allowed differential treatment.[143] The dissent also challenged the majority's narrow construction of *Locke*. Rather than confine *Locke* to its facts, the dissent would have upheld the principle behind *Locke*: a government "need not . . . fund certain religious entities . . . where doing so raises 'historic and substantial' establishment and free exercise concerns."[144] The dissent also pointed out that—in the area of religion—differential treatment did not "amount to discrimination."[145] A rule that holds otherwise, the dissent maintained, would render unconstitutional the accommodations of religion the Court has upheld in the past because the First Amendment protects both religion and non-religion, and—under the majority's understanding of discrimination—religious exemptions, immunities, and accommodations would discriminate against non-religion.[146] The dissent argued that this skews precedent in favor of religion by allowing differential treatment based on relig-

137. *Trinity Lutheran*, 137 S. Ct. at 2036–37.

138. *Id.* at 2036 (Sotomayor, J., dissenting).

139. *Id.* at 2036–38.

140. *Id.* at 2037. For a discussion of these provisions and of *Trinity Lutheran*'s impact upon them, see Bronwyn Roantree, *Challenging Statutory Accommodations for Religiously Affiliated Daycares: An Application of the Third-Party-Harm Doctrine*, 86 FORDHAM L. REV. 1393, 1421–22 (2017).

141. *Trinity Lutheran*, 137 S. Ct. at 2038 (Sotomayor, J., dissenting).

142. *Id.*

143. *Id.* at 2038–39.

144. *Id.* at 2039 (quoting Locke v. Davey, 540 U.S. 712, 725 (2004)).

145. *Id.* (Sotomayor, J., dissenting).

146. *Id.* at 2039–40.

ious status when it benefits religion and disallowing it when it does not benefit religion.[147]

The dissent also contested some of the majority's factual characterizations in the case. First, the dissent remarked that a refusal to fund churches "does not disfavor religion" but reflects a decision to remain secular: neutral between religion and atheism.[148] Furthermore, in the dissent's view, the majority incorrectly characterized the grant as a "generally available benefit" when it was only available to a few recipients.[149] Finally, even if strict scrutiny applied, the dissent would have labeled the strong anti-establishment interest codified in the laws of almost forty states as a compelling interest capable of surviving strict scrutiny.[150]

III. ANALYSIS

A. The Supreme Court's Holding in *Trinity Lutheran* Is Correct

The majority correctly held that Missouri violated the Free Exercise Clause by denying Trinity Lutheran Church a generally available public benefit solely on the basis of its status as a religious institution. The Establishment Clause does not forbid the funding, and the Free Exercise Clause requires it. Nevertheless, the dissent correctly suggested that the Court ought to have addressed the Establishment Clause issue.

The play in the joints doctrine is about the space between the Establishment Clause and the Free Exercise Clause. So, in potential play in the joints cases, courts should draw the boundaries of each clause when they explain why a government action falls within the discretionary zone between the religion clauses or within a mandate of one of the clauses. This is especially true in cases like *Trinity Lutheran*, where the Court applies strict scrutiny and the state offers an anti-establishment interest. This is because the Court weighs the importance of the anti-establishment interest against the federal Establishment Clause,[151] which it cannot properly do without first determining what the Establishment Clause says about the challenged policy.

If the Court did analyze the funding under the Establishment Clause, the correct answer would have been to uphold the funding. The most analogous case is *Bowen*.[152] Both *Bowen* and *Trinity Lu-*

147. *Id.* at 2040.
148. *Id.*
149. *Id.*
150. *Id.* at 2040–41.
151. *See id.* at 2024 (majority opinion).
152. *Bowen* is discussed in section II.A, *supra*.

theran involved programs designed to deal with public concerns—adolescent sexuality and pregnancy in *Bowen*, child safety and waste disposal in *Trinity Lutheran*—and both pursued their goals by paying institutions they deemed competent to help solve the problems.[153] And each program allocated funds by having potential applicants explain how they could solve the public concerns targeted by the programs.

In *Bowen*, the Court found that Congress could—without violating the Establishment Clause—set up a system that ultimately funded some religious organizations.[154] The Court approved the arrangement, even though this meant some secular organizations did not receive funds, because the recipients were selected through neutral criteria that did not favor or advance religion.[155] Thus, Missouri could provide grants to religious institutions without violating the federal Establishment Clause so long as it did so based on neutral criteria that did not favor religion.[156] Here, criteria included poverty in the neighborhood and the promotion of recycling[157]—criteria which neither reference nor favor religion. Because the Establishment Clause is not "so strict as to require the blanket exclusion of churches from generally available and entirely secular public benefits" and does not "rule out cooperation between governments and religious institutions in advancing safety, education, health, and social welfare," the Constitution permits Missouri to include churches in its grant program.[158]

Moreover, the concern that Missouri's program would functionally fund the Church's proselytic activity is resolved in *Bowen*, where the Court addressed concerns that paying churches to teach about sex would lead to government-funded teaching of religious dogma.[159] The *Bowen* Court reasoned that the coincidental overlapping of governmental and religious purposes did not invalidate the program because the government distributed the funding on a neutral basis across a "wide spectrum" of organizations, just like Missouri's grants.[160]

On the Free Exercise Claim, the majority's reasoning is more persuasive than the dissent's. It correctly construed *Locke*—a case which

153. *Compare* Bowen v. Kendrick, 487 U.S. 589, 606–07 (1988), *with Trinity Lutheran*, 137 S. Ct. at 2027 (Gorsuch, J., concurring), *and* Brief for Petitioner, *supra* note 12, at 1.
154. *Bowen*, 487 U.S. at 593, 597.
155. *Id.* at 605–12.
156. *See* Laycock, *supra* note 48, at 147–48.
157. *Trinity Lutheran*, 137 S. Ct. at 2017.
158. Richard W. Garnett, *Consensus & Uncertainty at the Supreme Court*, COMMONWEAL (Aug. 2, 2017), https://www.commonwealmagazine.org/consensus-uncertainty-supreme-court [https://perma.unl.edu/9FQL-VV4E].
159. *Bowen*, 487 U.S. at 612–13.
160. *Id.* at 610.

involved very strong establishment concerns and very weak free exercise concerns—narrowly and applied the discrimination rules from *Lukumi* and *McDaniel* instead.[161] Although scholars have criticized the Court's discrimination framing,[162] when a government discriminates on the basis of religion in the distribution of public benefits, it pressures religious adherents and institutions to abandon their religious practices and beliefs, and this pressure is inimical to the *free* exercise guaranteed by the First Amendment.[163]

Although the historical arguments[164] in Justice Sotomayor's "forceful and detailed"[165] dissent should not be dismissed, they do not apply in full force to the situation in *Trinity Lutheran*. The payment at issue in *Trinity Lutheran* was materially different from those criticized two hundred years ago, and the funding came in the context of a starkly different government.

The historical enemies of establishment fought against laws which funded "religion *qua* religion."[166] In other words, the laws "singled . . . out" churches and religious teachers for funding precisely because they were religious.[167] Since the laws assigned a benefit specifically to religious persons and for religious purposes, secular organizations, teachers, and aims did not likewise receive funding.[168] For instance, the Virginia bill that James Madison condemned in his "famous Memorial and Remonstrance"[169] singled out Christians for funding and, as its title, "A Bill Establishing a Provision for Teachers of the Christian Religion," suggests, had a religious purpose.[170]

Missouri did not single out religion for funding. Instead, the state offered a "generally available public benefit."[171] It did not specifically designate churches for a benefit nor did it extend a benefit only to, and

161. Richard W. Garnett & Jackson C. Blais, *Religious Freedom and Recycled Tires: The Meaning and Implications of* Trinity Lutheran, 2017 CATO SUP. CT. REV. 105, 121 (2017).

162. *See* Ira C. Lupu & Robert W. Tuttle, Trinity Lutheran Church v. Comer*: Paradigm Lost?*, AM. CONST. SOC'Y FOR L. & POL'Y SUP. CT. REV. (manuscript at 4) (accusing the majority of "deliberately obscur[ing] the constitutional difference between discrimination against individuals because of their religious identity, and generically distinctive treatment of all houses of worship"), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012274 [https://perma.unl.edu/WME2-QFE6].

163. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963).

164. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2033–35 (2017) (Sotomayor, J., dissenting).

165. Lupu & Tuttle, *supra* note 162.

166. Michael W. McConnell, *Religious Freedom at a Crossroads*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 183 (Geoffrey R. Stone et al. eds., 1992).

167. Locke v. Davey, 540 U.S. 712, 727 (2004) (Scalia, J., dissenting).

168. McConnell, *supra* note 166, at 183.

169. *Trinity Lutheran*, 137 S. Ct. at 2033 (Sotomayor, J., dissenting).

170. *Locke*, 540 U.S. at 727 (Scalia, J., dissenting).

171. *Trinity Lutheran*, 137 S. Ct. at 2024.

for the sole purpose of advancing, those who teach Christianity. Secular organizations received "comparable . . . assistance."[172] The program in *Trinity Lutheran* is therefore distinct from those criticized by the founding-era anti-establishmentarians.

When it comes to the historical anti-establishment arguments, this is not a distinction without a difference.[173] Madison argued that compelled support makes religious teachings less persuasive.[174] This only applies, however, when governments fund religion *qua* religion. Funding only certain denominations pressures churches to identify a certain way, ministers to preach a certain way, and churchgoers to attend a certain place. If a church knows that the government will pay it for teaching a favored doctrine, then instead of teaching what the church believes to be true, it may be pressured to teach what the government prefers. If a religion is widely professed, outsiders may attribute this to the funding it receives rather than its "innate excellence."[175]

These concerns do not attend funding arrangements like the one in *Trinity Lutheran*. When a government makes funds generally available and does not target certain denominations or dogmas, it removes the incentive for a church to change its identity or teachings.[176]

In fact, the funding arrangement preferred by the dissent, which provides funding only to *nonreligious* entities, is more like the arrangement Madison criticized, which provided funding only to *religious* entities, than the arrangement envisioned by the majority, which provides funding *regardless* of religious status. This is because the dissent's arrangement, like Virginia's arrangement, puts prospective recipients to a choice between maintaining their sincere religious beliefs and receiving government support.[177] While the Virginia establishment system creates incentives for potential recipients to adopt religious positions they *do not* sincerely hold, the dissent's no-funding system creates incentives for potential recipients to abandon religious positions they *do* sincerely hold. Both results are inconsistent with the aims of the religion clauses. Only a rule that prevents the government from singling out religion for special benefits, but requires the govern-

172. McConnell, *supra* note 166, at 183.

173. *See Locke*, 540 U.S. at 727–28 (Scalia, J., dissenting) ("One can concede the Framers' hostility to funding the clergy *specifically*, but that says nothing about whether the clergy had to be excluded from benefits the State made available to all. No one would seriously contend, for example, that the Framers would have barred ministers from using public roads on their way to church.").

174. *Trinity Lutheran*, 137 S. Ct. at 2033–34 (Sotomayor, J., dissenting).

175. *Id.* at 2033 (internal quotations omitted) (quoting MADISON, *supra* note 134, at 82–84).

176. In a vacuum, this funding may still provide an incentive for churchgoers to attend a particular church, but this concern is addressed by analyzing the overall context of government funding in the modern state. *See infra* note 195 and accompanying text.

177. *Trinity Lutheran*, 137 S. Ct. at 2021–22.

ment to include religion in general benefits, can satisfy the religion clauses. This rule is also more faithful to the historical arguments against establishment.

Furthermore, the funding in *Trinity Lutheran* comes in a notably different context. The role of government has changed dramatically since the anti-establishmentarians made their case.[178] In the establishment era, governments had not yet begun to "assist a wide range of charitable and educational activities."[179] In the context of a government that funds little, financial support of religion (and the accompanying onerous taxation) could reasonably be seen as a step toward establishment. But the same funding is much less mischievous in the "modern welfare-regulatory state" epitomized by higher levels of spending and taxing across the board.[180] This is because:

> [w]hen the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.[181]

Justice Scalia's "baseline" framing explains why a state does not violate the Establishment Clause when it makes a public benefit available to a church. It does not violate the Establishment Clause because it does not impermissibly "advance[ ] . . . religion."[182] Missouri funds all sorts of organizations through its resurfacing program.[183] To also fund churches does not "favor,"[184] "endorse,"[185] or "advance"[186] religion—it merely puts churches on a level playing field with other nonprofit organizations. In other words, it is neutral toward religion. And neutrality is the "touchstone" of Establishment Clause doctrine.[187]

The dissent argued *Tilton* controlled the Establishment question.[188] *Tilton* no longer controls. *Tilton* was decided in 1971, and to-

178. *See* Laycock, *supra* note 48, at 147 (arguing that although the principles of "no funding" and "no discrimination" were consistent at the time of the founding, the realities of modern government have made them inconsistent today).

179. McConnell, *supra* note 166, at 183.

180. *Id.* at 175.

181. Locke v. Davey, 540 U.S. 712, 726–27 (2004) (Scalia, J., dissenting).

182. *Trinity Lutheran*, 137 S. Ct. at 2028 (Sotomayor, J., dissenting) (internal quotations omitted) (quoting Agostini v. Felton, 521 U.S. 203, 222–23 (1997)).

183. Brief for Petitioner, *supra* note 12, at 1.

184. *See, e.g.*, McCreary Cty. v. ACLU of Ky., 545 U.S. 844, 860 (2005); Lee v. Weisman, 505 U.S. 577, 608 (1992).

185. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 763–65 (1995); County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989).

186. *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 9–10 (1993); Edwards v. Aguillard 482 U.S. 578, 584 (1987).

187. *McCreary*, 545 U.S. at 860.

188. *See supra* notes 120–123 and accompanying text.

day's Court interprets "Establishment" differently.[189] *Tilton* used the *Lemon* test to hold that governments could not fund, and therefore advance, religious activity. The modern Court modified *Lemon*[190] and narrowed the term "advance" under *Lemon* to exclude neutral funding.

Tilton's rule works for small, but not large governments.[191] Small governments express approval for religion when they tax citizens to fund churches.[192] Large governments do not express approval of religion when they tax citizens to fund churches. Large governments fund organizations that promote competing messages.[193] Because the messages conflict, the government does not express approval for a message by merely funding its promoter. Large governments express disapproval[194] when they tax religious and secular citizens but fund only secular organizations.[195]

Though the dissent explains why *small* governments may not fund churches,[196] it fails to explain why *large* governments may not fund churches. Though the dissent explains why governments may not fund churches *designedly*,[197] it fails to explain why governments may not fund churches *incidentally*. Though the dissent understands the religion clauses, it "fail[s] to recognize the effect of the change in governmental roles."[198] Our governments have changed. They not only fund more—more interests of more institutions—but also fund those interests and institutions in a different manner through neutral—not targeted—funding of a church.

B. Implications for Future Cases

1. School Choice

Trinity Lutheran may have substantial implications for school choice programs. Observers connected *Trinity Lutheran* and school

189. *See* Agostini v. Felton, 521 U.S. 203, 237 (1997).
190. *Id.* at 233 (treating the entanglement prong of the *Lemon* test not as a separate inquiry but "as an aspect of the inquiry into a statute's effect" and asking whether the entanglement has "the effect of advancing or inhibiting religion").
191. A large government is one that more "deeply" regulates "private life" and "the non-profit sector" and that taxes citizens more heavily to provide public benefits. *See* McConnell, *supra* note 166, at 181, 183.
192. *See id.* at 184.
193. *See id.* at 183.
194. The Establishment Clause also forbids a government from expressing disapproval of religion. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) (collecting cases).
195. *See* Richard A. Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375, 390 (1990).
196. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2033–35 (2017) (Sotomayor, J., dissenting).
197. *See id.*
198. McConnell, *supra* note 166, at 184.

choice when the case was decided;[199] after the decision, scholars have argued that *Trinity Lutheran* will require states with private school voucher programs to include private religious schools in those programs.[200] This does logically follow from the majority's reasoning in *Trinity Lutheran*.

Trinity Lutheran forbids states from distributing generally available public benefits in a way that discriminates on the basis of religion.[201] A voucher program is no less a generally available public benefit than a playground resurfacing program.[202] In fact, given the competitive and selective nature of the benefit in *Trinity Lutheran*, a voucher program might be even more generally available. When a state makes vouchers available for private secular schools but not for private religious schools, it discriminates on the basis of religion by excluding otherwise-eligible recipients from a benefit on the basis of their religious status.[203] Thus, if a state is to provide school choice benefits to private secular schools but not to private religious schools, it will need to pass strict scrutiny.

It is unlikely that such a program would pass strict scrutiny. On this point, *Zelman v. Simmons-Harris*[204] interacts with *Trinity Lutheran* in an important way. In *Zelman*, the Court upheld a voucher program that included private religious schools against an Establishment Clause challenge.[205] Thus, states may include religious schools in voucher programs without violating the federal Establishment Clause.[206] Under *Trinity Lutheran*, a state's decision not to fund religion is a mere "policy preference"—not a compelling interest—when the funding would be permissible under the federal Establishment Clause, unless it is as strong and historically-rooted as the interest in *Locke*.[207]

199. Valerie Strauss, *Will the Supreme Court's* Trinity *Decision Lead to the Spread of School Voucher Programs?*, WASH. POST (June 26, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/06/26/will-the-supreme-courts-trinity-decision-lead-to-the-spread-of-school-voucher-programs/?utm_term=.515dac7b2493 [https://perma.unl.edu/DZ4H-L45E].

200. William E. Thro & Charles J. Russo, *Odious to the Constitution: The Educational Implications of* Trinity Lutheran Church v. Comer, 346 ED. L. REP. 1, 12 (2017).

201. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017).

202. *See* Garnett & Blais, *supra* note 161, at 123 ("As Justice Breyer noted in his concurring opinion, '[p]ublic benefits come in many shapes and sizes,' including school vouchers.") (alteration in original) (footnote omitted).

203. *Id.*

204. Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

205. *Id.* at 645, 662–63.

206. Thro & Russo, *supra* note 200, at 12.

207. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017).

The Supreme Court itself apparently recognized the potential connection between *Trinity Lutheran* and school choice programs; when the Court decided *Trinity Lutheran*, it also vacated the judgments of two decisions upholding discrimination in private school vouchers,[208] and ordered reconsideration of those cases in light of *Trinity Lutheran*.[209]

The Executive Branch has also argued that some school choice programs are unconstitutional after *Trinity Lutheran*. Four months after *Trinity Lutheran*, the Attorney General issued a memorandum to guide agencies and departments on principles of religious liberty.[210] The memorandum relied on *Trinity Lutheran* and prohibited government actors from excluding religious schools from voucher programs.[211]

Following the memorandum, the Department of Justice filed an amicus brief challenging a Montana school choice program.[212] Montana's program uses tax credits to reimburse taxpayers who donate to "Student Scholarship Organizations."[213] Montana excludes religious schools from the program.[214] The Department of Justice argued that this exclusion violated the First Amendment under *Trinity Lutheran*.[215]

The possibility that *Trinity Lutheran* may make states include religious schools in their school choice programs has led even those who would otherwise welcome *Trinity Lutheran* to be wary.[216] If a court

208. *See* Colo. State Bd. of Educ. v. Taxpayers for Pub. Educ., 137 S. Ct. 2325 (2017); N.M. Ass'n of Non-Public Sch. v. Moses, 137 S. Ct. 2325 (2017).

209. Thro & Russo, *supra* note 200, at 12.

210. *See* Memorandum from the Attorney General, Federal Law Protections for Religious Liberty 1 (Oct. 6, 2017), https://www.justice.gov/opa/press-release/file/1001891/download [https://perma.unl.edu/AMN8-UACE].

211. *Id.* at 2–3.

212. *See* Brief for the United States as Amicus Curiae, Espinoza v. Mont. Dep't of Revenue, No. DA 17-0492 (Mont. Jan. 18, 2018).

213. Megan Eckstein, Espinoza v. Montana Department of Revenue*: Tax Credits, Religious Schools, and Constitutional Conflict*, 79 MONT. L. REV. ONLINE 15, 15 (2018), https://scholarship.law.umt.edu/mlr_online/vol79/iss1/3 [https://perma.unl.edu/5XHP-UTWM] ("Taxpayers use the program as follows: first, a taxpayer makes a charitable donation to a Student Scholarship Organization (SSO). The program then allows the taxpayer to claim a tax credit for up to $150 on their tax return. Next, a parent or guardian who wants to send their child to a qualified education provider selects the school of their choice. Finally, the SSO delivers the scholarship funds directly to the chosen school.").

214. *Id.* at 16.

215. *See* Brief for the United States as Amicus Curiae, *supra* note 212, at 11–16.

216. Frank Ravitch, *Symposium:* Trinity Lutheran *and* Zelman *– Saved by Footnote 3 or a Dream Come True for Voucher Advocates?*, SCOTUSBLOG (June 26, 2017, 10:59 PM), http://www.scotusblog.com/2017/06/symposium-trinity-lutheran-church-v-comer-zelman-v-simmons-harris-saved-footnote-3-dream-come-true-voucher-advocates/ [https://perma.unl.edu/338N-N944] ("Quite honestly, if it were not for *Zelman* I would welcome the decision in *Trinity Lutheran*.").

mandates including private religious schools in these programs, it may create a system where parents who would otherwise prefer not to send their children to religious schools have no choice but to do so.[217] A system like this arguably existed in *Zelman*, where the public school system was failing and where nearly all recipients of the private school vouchers were religious.[218] The only good secular options for parents were the magnet or charter schools, but those were not available to all students as they were gated through a lottery system.[219] The system functionally forced lottery losers to choose between giving their children an inadequate education or a religious one. Furthermore, a voucher system can hurt the public schools by draining funds from those schools. This makes the system more coercive over time as the increasing diversion of funds leads to poorer education, which pushes more parents to choose the voucher system, which diverts more funds[220] —and the cycle continues.

On the other hand, so long as there are adequate secular options (either a strong public school system or plentiful secular private schools), the inclusion of private religious schools in this public benefit system is probably the right outcome. The same concerns that lead one to criticize a situation like *Zelman*'s—where the only practical choice for most families is religious schooling—should lead one to criticize a situation where the only practical choice for most families is secular schooling. Just as the parents who would rather their children not attend religious schools are pressured to do so in a situation like *Zelman*'s, parents who would rather their children not attend secular schools are similarly pressured when the government—after taxing both secular parents *and* religious parents—distributes vouchers only to secular schools.

2. FEMA Funds

An area where *Trinity Lutheran* has already had an effect is in the distribution of Federal Emergency Management Agency (FEMA) funds. FEMA formerly refused to fund houses of worship.[221] In the aftermath of Hurricane Harvey, several Texas churches sought assistance from FEMA to repair their buildings, but FEMA's policy of categorically excluding churches made them ineligible.[222] The churches

217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. Emma Green, *Will Trump Direct FEMA to Fund Churches Hit by Hurricanes?*, ATLANTIC (Sept. 11, 2017), https://www.theatlantic.com/politics/archive/2017/09/hurricane-harvey-faith-based-organizations-fema-trump/539346/ [https://perma.unl.edu/SL6D-XZ9C].
222. Justin Wm. Moyer, *Trump Tweets Support for Texas Churches Seeking FEMA Money After Harvey; Lawsuits Already Filed*, WASH. POST (Sept. 8, 2017), https://

sued, claiming that FEMA's policy violated the Free Exercise Clause under *Trinity Lutheran*'s rule.[223] In January 2018, FEMA announced that it would no longer exclude churches[224] and the parties agreed to dismiss the case.[225]

If the case had not been dismissed, the correct outcome under *Trinity Lutheran* would have been to strike down FEMA's policy. Again, the rule from *Trinity Lutheran* states that governments may not exclude a potential recipient from receiving a generally available public benefit on the basis of religion without passing strict scrutiny.[226] FEMA funds are a public benefit.[227] Although they are only available to some citizens at some times, they are at least as generally available as the benefit in *Trinity Lutheran*, which was limited and competitive. FEMA's policy discriminated on the basis of religion: its policy of categorically preventing churches from receiving funds is analogous to the Missouri policy struck down in *Trinity Lutheran*.

Thus, the federal government would need to show that FEMA's exclusionary policy was narrowly tailored to achieve a compelling interest in order to survive the churches' challenge. But the policy achieves no government interest aside from the anti-establishment interest. In fact, the exclusion of churches was "particularly irrational" because FEMA relied on churches to achieve its post-disaster goals.[228] This also suggests that the anti-establishment interest was not compelling because it showed that FEMA's policy was underinclusive.[229] If separation of church and state in disaster relief were a compelling interest, FEMA would not undermine that interest by working with and through churches.

Even so, when the District Court denied a motion for a preliminary injunction filed by the churches, it held that the churches were likely to fail on the merits because FEMA discriminated on religious *use*, not

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www.washingtonpost.com/news/acts-of-faith/wp/2017/09/07/texas-churches-damaged-during-harvey-sue-fema-for-federal-funding-denied-houses-of-worship/?utm_term=.eec40f841f41 [https://perma.unl.edu/MMB2-DTH3].

223. Complaint at 1, Harvest Family Church v. FEMA, No. CV H-17-2662, 2017 WL 6060107 (S.D. Tex. Dec. 7, 2017), *order vacated*, *appeal dismissed*, No. 17-20768, 2018 WL 386192 (5th Cir. Jan. 10, 2018).

224. Michelle Boorstein, *In a Shift, Trump Administration Says Houses of Worship Can Apply for FEMA Funding for Hurricane Harvey Relief*, WASH. POST (Jan. 9, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/01/04/in-a-shift-trump-administration-says-houses-of-worship-can-get-direct-fema-funding-after-disasters/?utm_term=.da2c5326f960 [https://perma.unl.edu/RL2S-6ZDP].

225. *Harvest Family Church*, 2018 WL 386192, at *1.

226. Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 (2017).

227. *See* McWaters v. FEMA, 436 F. Supp. 2d 802, 826 (E.D. La. 2006).

228. Complaint, *supra* note 223, at 11.

229. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 543–47 (1993).

status.[230] The majority in *Trinity Lutheran* emphasized religious "status" when analyzing Missouri's discrimination.[231] It reasoned that religious *status* and *identity* receive more constitutional protection from discrimination than religious *use*. For instance, in the contentious footnote 3, the majority said that the decision addressed "religious identity," not "religious uses,"[232] and the Court said that *Locke* did not control because *Locke* permitted states to discriminate in funding on the basis of religious *use*, while Missouri's program discriminated in funding on religious *status*.[233]

The District Court cited the status–use distinction and footnote 3 to justify a narrow reading of *Trinity Lutheran* and a broad reading of *Locke*.[234] This illustrates an early trend. Other courts have similarly used the Court's language to narrow *Trinity Lutheran*.[235] If the status–use distinction prevails, then many policies like FEMA's—addressing *use*, not *status*—may survive constitutional challenges.

C. The Majority's Status–Use Distinction Is Incorrect

The remainder of this Note argues that Justice Gorsuch's concurring opinion is correct and the majority's status–use distinction should not be retained.

1. The Status–Use Distinction Is Inconsistent with Supreme Court Precedent

The Court's status–use distinction is not supported by Free Exercise jurisprudence and is inconsistent with the cases on which the majority relied for its holding. The majority cited *McDaniel* frequently

230. Harvest Family Church v. FEMA, No. CV H-17-2662, 2017 WL 6060107, at *3–5 (S.D. Tex. Dec. 7, 2017), *order vacated*, *appeal dismissed*, No. 17-20768, 2018 WL 386192 (5th Cir. Jan. 10, 2018). FEMA's policy excluded churches because they were used for religious activities, not because they were owned by religious institutions. Complaint, *supra* note 223, at 9 (quoting FED. EMERGENCY MGMT. AGENCY, FP 104-009-2, PUBLIC ASSISTANCE PROGRAM AND POLICY GUIDE (Apr. 2017), https://www.fema.gov/media-library-data/1496435662672-d79ba9e1edb16e60b51634af00f490ae/2017_PAPPG_2.0_508_FINAL(2).pdf [https://perma.unl.edu/N9YM-JU2Z]).

231. *See Trinity Lutheran*, 137 S. Ct. at 2019–22.

232. *Id.* at 2024 n.3.

233. *Id.* at 2022–24 ("Davey was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry. Here there is no question that Trinity Lutheran was denied a grant simply because of what it is—a church.").

234. *Harvest Family Church*, 2017 WL 6060107, at *3–4.

235. *See, e.g.*, Ill. Bible Colls. Ass'n v. Anderson, 870 F.3d 631, 640 (7th Cir. 2017) (quoting *Trinity Lutheran*, 137 S. Ct. at 2024); Freedom from Religion Found. v. Morris Cty. Bd. of Chosen Freeholders, 181 A.3d 992, 1010 (N.J. 2018) (same); Taylor v. Town of Cabot, No. 2016-276, 2017 WL 4454708, at *7 ¶27 (Vt. Oct. 6, 2017) (same).

and considered it analogous to *Trinity Lutheran*.[236] When the Court quoted *McDaniel*, however, it misleadingly made *McDaniel* appear to be concerned only with discrimination against *status* and unconcerned with discrimination against *conduct* or *use*.[237]

For instance, the Court used the following quote from *McDaniel* : "to condition the availability of benefits . . . upon [a recipient's] willingness to . . . surrender[ ] his religiously impelled [status] effectively penalizes the free exercise of his constitutional liberties."[238] However, the *McDaniel* Court's original statement made clear that it was concerned with conduct: "[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties."[239] Thus, the *McDaniel* Court found it impermissible to condition a benefit on protected conduct; the government cannot force one to violate the principles of one's faith or to abandon the work of ministry.

This was made even more clear by the *McDaniel* Court's discussion. The specific liberties that Tennessee penalized were, "the right to preach, proselyte, and perform other similar religious functions" all *verbs* which the Free Exercise Clause "unquestionably encompasses."[240] The *McDaniel* Court did describe Tennessee's law as impermissibly disqualifying McDaniel based on his "*status* as a 'minister,'"[241] but only an unfaithful reading of *McDaniel* construes this statement as dealing "solely"[242] with status as the *Trinity Lutheran* majority did. "Status" in this situation was defined by state law "in terms of conduct."[243] Moreover, the Court itself classified "minister" through the protected actions of "preach[ing], proselyt[ing], and perform[ing]."[244]

The *McDaniel* Court did not divide between *status* and *use*, giving full protection to status and withholding full protection from use. Instead, it divided between "freedom to believe," which receives absolute protection, and "freedom to act," which can be "overbalanced" only by "interests of the highest order . . . not otherwise served," and which

236. *See Trinity Lutheran*, 137 S. Ct. at 2019–24.
237. *See id.* at 2020–22.
238. *Id.* at 2022 (alterations by *Trinity Lutheran* court) (quoting McDaniel v. Paty, 435 U.S. 618, 626 (1978)).
239. *McDaniel*, 435 U.S. at 626 (alterations by *McDaniel* court) (quoting Sherbert v. Verner, 374 U.S. 398, 406 (1963)).
240. *Id.* at 625–26.
241. *Id.* at 627 (quoted in *Trinity Lutheran*, 137 S. Ct. at 2020).
242. *Trinity Lutheran*, 137 S. Ct. at 2020.
243. *McDaniel*, 435 U.S. at 627.
244. *Id.* at 626.

includes both religious *status* and religious *conduct* or *use*.[245] Thus, a faithful reading of *McDaniel*—a case on which the Court so heavily relies and yet so obviously misconstrues in this regard—sees status and use as deserving—and receiving—identical protection, namely, the protection of strict scrutiny.

2. The Status–Use Distinction Is Inconsistent with Sound Discrimination Principles

The majority considers this to be a case about religious discrimination.[246] But the status–use distinction employed by the majority is inconsistent with the majority's "paradigm of nondiscrimination"[247] because it is out of step with the Court's nondiscrimination principles. In *Lawrence v. Texas*, Justice O'Connor wrote in her concurring opinion:

> Texas argues, however, that the sodomy law does not discriminate against homosexual persons. Instead, the State maintains that the law discriminates only against homosexual conduct. While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class.[248]

In *Christian Legal Society v. Martinez*, the Court "explicitly embraced"[249] O'Connor's approach and relied on it to uphold a law school's policy that prevented Registered Student Organizations from discriminating on the basis of sexual orientation.[250] Elsewhere, the Iowa Supreme Court used the O'Connor approach—conflating status and conduct—to strike down a prohibition on same-sex marriage as violative of its state Constitution,[251] and to rebut arguments by religious business owners that they do not violate public accommodation

245. *Id.* at 627–28, 627 n.5.

246. Lupu & Tuttle, *supra* note 162 (manuscript at 4) ("The paradigm of nondiscrimination is front and center, and forms the opinion's emotional pivot. Near the end, the opinion uses the line "no churches need apply" to describe the workings of the Missouri scheme. This was factually accurate, but its form is clearly designed to evoke the invidious discrimination associated with exclusion of members of particular races, nationalities, or religions from employment opportunity. The Chief Justice appeals to precisely the same concern about prejudice in the very last section of the opinion, in which he invokes Maryland's long-ago exclusion of Jews from public office.").

247. *Id.*

248. Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in judgment).

249. Clifford J. Rosky, *No Promo Hetero: Children's Right to Be Queer*, 35 CARDOZO L. REV. 425, 472 (2013).

250. 561 U.S. 661, 689 (2010).

251. Varnum v. Brien, 763 N.W.2d 862, 885 (Iowa 2009).

laws when they refuse to serve same-sex weddings.[252] The O'Connor conflation approach recognizes the illusory nature of the status–use distinction.[253] The conflation approach properly "protects identity, not only in its static dimensions, but through its manifestations."[254]

Recognizing the force behind the idea that "when the actions are so closely related with the status, one cannot discriminate against the act,"[255] some have advocated for its application in areas beyond sexual orientation. For instance, commentators have adopted O'Connor's language and adapted her reasoning to argue that the status–conduct conflation approach is appropriate in the contexts of race[256] and gender.[257]

Justice Gorsuch is right. In the context of religious discrimination under the Free Exercise Clause, O'Connor's status–conduct conflation should govern, not the *Trinity Lutheran* majority's status–use distinction. Religion, like sexual orientation, is "defined in part by conduct that at once expresses and defines one's identity and beliefs."[258] Religious conduct (or use) is also "closely linked to one's religious identity."[259] And the Court itself has endorsed the reasoning of the status–conduct conflation in the context of religion. As Justice Scalia put it, "a tax on wearing yarmulkes is a tax on Jews."[260]

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252. *See, e.g.*, Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 280–81 (Colo. App. 2015); Elane Photography, LLC v. Willock, 309 P.3d 53, 62 (N.M. 2013).

253. Rosky, *supra* note 249, at 473.

254. Joseph Landau, *"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law*, 32 FORDHAM URB. L.J. 237, 263 (2005).

255. Joshua Bauers, *The Price of Citizenship: An Analysis of Anti-Discrimination Laws and Religious Freedoms in* Elane Photography, LLC v. Willock, 15 RUTGERS J.L. & RELIGION 588, 608 (2014).

256. Lupe S. Salinas, *Linguaphobia, Language Rights and the Right of Privacy*, 3 STAN. J.C.R. & C.L. 53, 88 (2007) ("While it is true that the [restrictions] apply only to [the] conduct [of speaking Spanish], the conduct [of speaking Spanish] targeted by this [restriction] is conduct that is closely correlated with being [Latino]. Under such circumstances, [a restriction on speaking Spanish] is targeted at more than conduct. It is instead directed toward [Latinos] as a class.").

257. Louise Melling, *Will We Sanction Discrimination?: Can "Heterosexuals Only" Be Among the Signs of Today?*, 60 UCLA L. REV. DISCOURSE 248, 256 (2013) ("While it is true that the [rule] applies only to [a service], the [service] targeted . . . is closely correlated with being [a woman]. Under such circumstances, [the] law is targeted at more than [a service]. It is instead directed toward [women] as a class.").

258. Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW. J.L. & SOC. POL'Y 236, 252 (2010).

259. *Id.*

260. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993).

IV. CONCLUSION

Trinity Lutheran is correct. The rule it announces—that governments may not disqualify otherwise-eligible recipients from public benefits on the basis of their religious character—tracks the text of the First Amendment and the Court's Free Exercise Clause precedents, and it is supported by the Court's discrimination principles and a discerning analysis of the modern state.

Less certain are the case's consequences. Its potential reach is wide. Today's governments offer an increasing number of public benefits. Many states have constitutional provisions like Missouri's that operate to keep those benefits from flowing to religious institutions. Some federal programs have similar restrictions. Thus, school choice programs are but one of a vast array of benefits currently in violation of a broad reading of *Trinity Lutheran*'s rule. But while *Trinity Lutheran*'s potential reach is wide, its actual reach may be narrow. Features of the case and of the majority opinion offer courts the means to narrowly interpret the case. Footnote 3, though not part of the Court's opinion, has already been used to narrow the case,[261] though—as Justice Gorsuch pointed out—it is a mistake to ignore the broad principles and rules acknowledged and applied by the Court. The status–use distinction, if not repudiated, may similarly narrow *Trinity Lutheran*, and—ironically—widen *Locke*, which the *Trinity Lutheran* Court construed narrowly.[262]

For the near future, *Trinity Lutheran*'s impact and legacy will be in the hands of lower court judges. If the case is to breathe, it will require the labor of judges who recognize and defend the case's animating principles and who refuse to dismiss the case by simply invoking footnote 3. When the question of the scope of *Trinity Lutheran* comes before the Supreme Court, the answer will depend on the realignment of the seven-Justice coalition from *Trinity Lutheran*. When "another day" comes, Justice Breyer—who emphasized the narrow nature of the benefit in *Trinity Lutheran*—is the most likely defector. For forecasting purposes, Justice Kagan's joining the majority in full is noteworthy, as it suggests the case's reading of precedent and its reasoning have the support of six Justices. As for the status–use distinction, it remains to be seen whether—when the distinction determines the outcome of a case—Justices Gorsuch and Thomas can persuade three other Justices to abandon the distinction.

261. *See* Real Alts., Inc. v. Sec'y of Health and Human Servs., 867 F.3d 338, 361 n.29 (3d Cir. 2017) (interpreting footnote 3 as "[s]ignaling [the Court's] intent to confine its holding to the particular facts and issue before it").

262. *See supra* notes 234–235 and accompanying text.